

United States
Court of Appeals
 For the Ninth Circuit

S. P. BEECHER,

Appellant,

vs.

THE LEAVENWORTH STATE BANK
 and THE FEDERAL LAND BANK OF
 SPOKANE, et al,

Appellees.

*Appeal from the District Court of the Eastern
 District of Washington, Northern Division*

On Petition for Rehearing

BRIEF OF APPELLEES

HENRY R. NEWTON,
 8th floor Welch Building,
 Spokane 8, Washington.
Attorney for Appellee,
 The Federal Land Bank of Spokane.

C. D. RANDALL,
 1017 Paulsen Building,
 Spokane 8, Washington.

HERMAN HOWE,
 8th floor Hoge Building,
 Seattle 4, Washington.
Attorneys for Appellee,
 Leavenworth State Bank.

THE FRANKLIN PRESS, SPOKANE

FILED

DEC - 5 1950

PAUL P. O'BRIEN,
 CLERK

United States
Court of Appeals
For the Ninth Circuit

S. P. BEECHER,

Appellant,

vs.

THE LEAVENWORTH STATE BANK
and THE FEDERAL LAND BANK OF
SPOKANE, et al,

Appellees.

*Appeal from the District Court of the Eastern
District of Washington, Northern Division*

On Petition for Rehearing

BRIEF OF APPELLEES

HENRY R. NEWTON,
8th floor Welch Building,
Spokane 8, Washington.
Attorney for Appellee,
The Federal Land Bank of Spokane.

C. D. RANDALL,
1017 Paulsen Building,
Spokane 8, Washington.

HERMAN HOWE,
8th floor Hoge Building,
Seattle 4, Washington.
Attorneys for Appellee,
Leavenworth State Bank.

SUBJECT INDEX

	<i>Page</i>
Statement of the Case.....	1 to 3
The amount payable for redemption of the orchard should be fixed as of the date of the termination of the stay.....	3 to 7
Any date for the determination of the amount payable for redemption other than the date of the termination of the stay should be fixed by the trial court in the exercise of its inherent equity powers after showing as to the necessity therefor....	7 to 12

TABLE OF CASES

Page

Federal Farm Mortgage Corporation v. Paulsen, 149 F. (2) 897 (9 Cir.).....	3
Haun v. Second Alliance Trust Co. Ltd., 155 F. (2) 618 (9 Cir.).....	4
Wright v. Union Central Life Insurance Co., 311 U. S. 273.....	5
Wright v. Union Central Life Insurance Co., 126 F. (2) 92 (7 Cir.).....	11

STATEMENT OF THE CASE

On October 28, 1950, the Court entered an Order granting Appellant's Petition for Rehearing but limited solely to the question as to the date at which the property is valued.

The record shows that on January 27, 1948, the Court entered an Order granting the request of the Debtor and his creditors for reappraisal and referred the proceedings to the Commissioner to set a date for the hearing of evidence as to the value of the Debtor's property, and to fix the value of the Debtor's property in accordance with the evidence submitted (Tr. 12084, Vol. V, p. 1062).

On April 9, 1948, the Court entered an Order terminating the stay and ordered the proceedings to be referred to the Conciliation Commissioner for the purpose of determining the value of the property in accordance with the Order of the Court entered on January 27, 1948, and after determining the value of the property from the evidence, to fix a reasonable time within which the Bankrupt shall redeem (Tr. 12084, Vol. V, p. 1170, 1174).

The proceedings which led up to the making of this Order are found in the Record, No. 12084, and are as follows:

August 2, 1947, Farm-Debtor filed a document entitled "Petition and Tender of Money on Redemption" (Tr. Vol. I, p. 201).

August 7, 1947, The Federal Land Bank filed its Petition for Reappraisal (Tr. Vol. I, p. 216).

August 9, 1947, The Leavenworth State Bank filed its Petition for Reappraisal (Tr. Vol. I, p. 218).

January 27, 1948, Farm-Debtor filed his Petition for Reappraisal (Tr. Vol. V, p. 1058).

January 27, 1948, the Court ordered that the Petitions of the creditors and of the Debtor be granted, and instead of reappraisal, the Court directed that the value of the Debtor's property be fixed after hearing in accordance with the evidence submitted (Tr. Vol. V, p. 1062).

April 9, 1948, the Court entered an Order terminating the stay (Tr. Vol. V, 1170-1175).

Pursuant to the Order of January 27, 1948, the hearing after several continuances was finally held at Wenatchee on May 26, 1948 (Tr. 12216, Vol. I, 1 and 2). Evidence was taken and the Commissioner fixed the value as stated in his Order of June 1, 1948 (Tr. 12216, Vol. I, 67 to 73). The Order was affirmed on Petition for Review by the District Judge on December 20, 1948 (Tr. 12216, Vol. II, 275-6).

Attached to the Appellant's Brief is a Petition by Farm-Debtor to redeem and for reappraisal filed the 7th of February, 1948.

It will be noted that this Petition was filed with the Conciliation Commissioner eleven days after the Court had already entered the Order of January 27,

1948, directing a reappraisal of the property of the Farm-Debtor, on petitions filed by the Farm-Debtor and the creditors.

The Petition of the Farm-Debtor to redeem and for reappraisal filed with the Conciliation Commissioner February 7, 1948, is a nullity for the reason that the Court had already entered an Order on January 27, 1948, on the Petition of the Farm-Debtor and the creditors granting their request for a reappraisal. Farm-Debtor could not generate any rights in himself by requesting the Court to do that which the Court had already ordered done.

THE AMOUNT PAYABLE FOR REDEMPTION OF THE ORCHARD SHOULD BE FIXED AS OF THE DATE OF THE TERMINATION OF THE STAY.

The date as of which the property is to be valued under the circumstances of this case, is as of the date of the termination of the stay for the reason that the rights of the Debtor are fixed as of the date of the termination of the stay whether by lapse of time or by Order of the Court.

In the case of the *Federal Farm Mortgage Corporation v. Paulsen*, 149 F. (2) 897 (9 Cir.), it appeared that the Debtor failed within the three year period to redeem the property by paying the appraised value. The Referee decided under date of December 12, 1943, that the stay had expired on March 25, 1943. The Debtor had failed to pay into Court the appraised value of the property and had not sought reappraisal

within the three year period. Meanwhile on September 23, 1943, the Debtor filed a Petition for Reappraisal. The Court held that the Debtor's rights were fixed as of the termination of the stay and that thereafter he did not have the right to reappraisal.

The Court said that "If at the end of the three years the Debtor has not paid into Court the appraised value of the property, and if neither he nor any of his creditors have demanded a reappraisal, the stay ceases to be operative and the right to redeem at the appraised figure terminates."

In the present case, the Order setting aside the stay was entered April 9, 1948 (Tr. 12084, Vol. V, 1170-1175), whereas the Order directing a reappraisal was entered by the Court on January 27, 1948 (Tr. 12084, Vol. V, 1058).

Therefore the value should be determined as of the date of the termination of the stay for the reason that the rights of the parties became fixed as of that date.

This is borne out also by the case of *Haun v. Second Alliance Trust Co. Ltd.*, 155 F. (2) 618 (9 Cir).

In this case the Court pointed out that the proviso relating to reappraisals, Sec. 75 (s) (3), does not in terms require that the request for reappraisals be made within the period of the stay. But the Court went on to say:

“In the case of debtor, however, he must necessarily ask a reappraisal within the period if he desires to redeem and is dissatisfied with the existing valuation placed upon the property. The compulsion grows out of the circumstances that his right to redeem is lost if not exercised within the time provided unless at the termination of the period reappraisal proceedings are pending. *Federal Farm Mortgage Corporation v. Paulsen*, (9 Cir.) 149 F. (2) 897. But the creditor is not under similar compulsion. His role is passive; like the debtor, his right to reappraisal is absolute, but unlike the debtor, he is not placed by the statute under the necessity of demanding the right within a fixed period of time. If he acts promptly after the debtor indicates his purpose to redeem, we think the Court is not only empowered, but is probably required to cause a reappraisal to be made at the creditor’s request.

* * *

“After the reappraisal is had, the debtor is given the right by the express terms of the section, to pay into Court the value so placed upon the property, and to receive title to the same free and clear of encumbrances. The necessary implication of the statutory language is that this may be done within such reasonable time after the reappraisal as the Court may fix.”

Wright v. The Union Central Life Insurance Co., 311 U. S. 273, does not support Appellant’s contention that reappraisals must be as of the date of redemption, because it is obvious, and the Courts have so held, that the Farm-Debtor is entitled to know before he attempts to redeem, how much money he will have to raise or borrow to effect a redemption, and therefore the appraisal must always be made before the redemption.

In the Wright case, *supra*, the Court stated the issue involved as follows:

“The only issue presented by this Petition for certiorari, and which moved us to grant it, is whether under Section 75 (s) (3), the debtor must be accorded an opportunity on his request to redeem the property at the reappraised value or at a value fixed by the Court before the Court may order a public sale.”

In this case the Respondent had filed a petition praying that the proceedings be dismissed because of the failure of the Farm-Debtor among other things, to comply with the orders of the Court requiring the payment of rent, etc. The Debtor filed both an Answer to the petition and a cross-petition under Section 75 (s) (3), to have the land appraised or a date set for hearing, and after hearing evidence, to have its value fixed, and to be allowed to redeem at that value.

The Respondent answered, alleging that the Debtor was not entitled to redeem at such value, and that by the terms of Section 75 (s) (3) its request for a sale took precedence over any such right of the Debtor.

The lower Court ordered the property sold at public sale.

The Supreme Court held that a denial of an opportunity by the Debtor to redeem as a figure fixed by the Court before a public sale, was error, it appearing that the request for reappraisal by the Debtor had been made within the three year period, but the

inference from this case is that the value was to be fixed as of the date of the termination of the stay, for the Court said, page 280:

“The power of the Court to ‘order the property sold or otherwise disposed of as provided for in this Act,’ cannot be taken to mean a discretionary power to terminate the proceedings through the exclusive devise of a public sale. Congress has provided that certain contumacious conduct on the part of the debtor or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof. We cannot infer, however, that Congress intended that such facts should have any further legal significance under the Act. To hold that they empowered the court to deprive the debtor of his express and fundamental statutory right to redeem at the reappraised value or at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act to aid and protect farmer-debtors who were victims of the general economic depression.”

In other words, all the Wright case held was that the Farm-Debtor should be accorded the right to redeem at the reappraised value or at a value fixed by the Court before the Court may order a public sale. It did not specifically state the date when the valuation should be made, but the inference is quite clear from the whole case that the Debtor and the creditors are entitled to have the valuation fixed as of the date of the termination of the stay.

ANY DATE FOR THE DETERMINATION OF
THE AMOUNT PAYABLE FOR REDEMPTION

OTHER THAN THE DATE OF THE TERMINATION OF THE STAY SHOULD BE FIXED BY THE TRIAL COURT IN THE EXERCISE OF ITS INHERENT EQUITY POWERS AFTER A SHOWING AS TO THE NECESSITY THEREFOR.

In this case the value was fixed at the approximate date of the termination of the stay order, the Order terminating the stay having been entered on April 9, 1948, and the hearing having been held before the Conciliation Commissioner on May 26, 1948.

Because of the Debtor's alleged illness, this Court has reversed the Order of the Conciliation Commissioner denying a further continuance of the hearing and set aside the Order with respect to the valuation.

In the meantime it is perfectly proper to point out that the Farm-Debtor took all the time that an indulgent Court would grant before perfecting his appeal, with the result that between the date upon which the Order fixing the value was entered on June 1, 1948, and September 14, 1950, when the Decision of this Court was filed, two years, three months and thirteen days have elapsed. By the time the matter is finally determined upon rehearing, it probably will be nearly three years since the Order terminating the stay was entered. During that time the Farm-Debtor has methodically neglected his orchard property with the deliberate purpose of depreciating its value in every way he can. He has neglected to make the repairs authorized by the Conciliation Com-

missioner on his dwelling house. During the year 1950, by his own statement, he took practically no care of the orchard whatsoever.

We submit that if a date other than the date of the termination of the stay is to be fixed for the purpose of determining the value of the property of the Farm-Debtor for the purpose of redemption, that the Court should take into consideration the fact that the Farm-Debtor has deliberately neglected the orchard in order to depreciate its value since that date.

That record of course is not before the Court, but we sincerely believe that it is proper to call the Court's attention to it, and therefore we have filed in this case and submit for the consideration of the Court, certified copies of the following documents, to-wit:

(1) Petition of the Farm-Debtor to Spray Orchard dated July 19, 1950, in which he admits that no spray has been applied this season, and that serious damage is expected to the crop as well as to adjoining orchards.

(2) Certificate of Conciliation Commissioner on Order Made and Entered on August 4, 1950, on Petition of the Farm-Debtor for authority to Spray Orchard, which reveals the fact that the Farm-Debtor had deliberately let the orchard go to pot.

(3) Order to Show Cause issued by Judge Driver requiring the Farm-Debtor to appear and show cause why he should not be punished for contempt for failure to obey orders of the Conciliation Commissioner.

(4) Report of Frank Springer on the condi-

tion of the Farm-Debtor's orchard.

(5) Order of the Judge on Farm-Debtor's Petition for Review of the Order of August 4, 1950. In this Order the Court finds as a fact, that the Farm-Debtor has neglected to prune or spray or to do any thinning work on the orchard property during the season of 1950; that only a very small part of the orchard had been irrigated, and that lack of water was evidenced by the fact that the trees were in a wilted condition. That the apples were very wormy and in such condition due to no thinning, no irrigation and no spraying, that it was doubtful whether the apples could be harvested for sufficient to pay for the cost of harvesting. That the Farm-Debtor has definitely neglected to perform the usual and customary work of pruning, cultivating, fertilizing, spraying and thinning on said orchard during the crop year 1950; that the Farm-Debtor in open Court refused to use or cause to be used any of the funds in his possession for the purpose of doing any of the required work upon said orchard.

From this Order the Farm-Debtor appealed on October 2, 1950.

It would work a grave injustice upon the creditors in this case if the Farm-Debtor, because of delays for which the creditors were in no way responsible and because of the Farm-Debtor's deliberate effort to depreciate the value of the property, were permitted to redeem at a valuation fixed as of the present time. That would permit the Farm-Debtor to profit by his own wrong.

All of these facts are shown by the certified copies above referred to and we trust that the Court will

take them into consideration in determining the question involved.

If the date of the termination of the stay is not fixed as the date upon which the valuation should be found, we submit that such date should at least be left to the judgment and discretion of the Trial Court who can hear evidence with respect to the conduct of the Farm-Debtor in depreciating the value of the orchard property since the termination of the stay, and fix a date for the valuation of the property which will do justice to both parties.

In *Wright v. Union Central Life Insurance Co.*, 126 F. (2) 92 (7 Cir.), the Court points out that there necessarily must be vested in the trial court very broad discretion in fixing the date as of which the valuation of the Farm-Debtor's property may be made. The Court there points out that the power of the Court to order reappraisal is inherent in equity principles, and that the facts in each case must guide the Court. "Equity alone measures the Court's power."

We submit that the proper date for determining the valuation of the property in this case is April 9, 1948, the date upon which the stay was terminated, and that if the date of the termination of the stay is not the proper date in this case, then the date should be left to the determination of the trial court who will be in position to hear evidence and determine whether or not the property has depreciated since the termination of the stay by reason of the neglect

of the Farm-Debtor, and upon that evidence the Court will fix a date for determining the valuation of the property that will do equity to both parties.

Respectfully submitted,
HENRY R. NEWTON,
Attorney for Appellee,
The Federal Land Bank of Spokane.

C. D. RANDALL,
HERMAN HOWE,
Attorneys for Appellee,
The Leavenworth State Bank.